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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations,
(Caldwell, College Station and
Gause, Texas)

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MM Docket No. 58

RM-7419

RM-7798

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: The Commission

**SUPPLEMENTAL COMMENTS OF
BRYAN BROADCASTING LICENSE SUBSIDIARY, INC.**

Bryan Broadcasting License Subsidiary, Inc., licensee of station KTSR(FM), College Station, Texas (hereinafter "KTSR"), by its attorneys, hereby submits comments in response to the Commission's "Request for Supplemental Comments in Response to Court Remand."^{1/} In its request, the Commission indicates that when it issued its July 22, 1998 Memorandum Opinion and Order in this proceeding, it had inadvertently failed to consider the Second Supplement to Application for Review ("Second Supplement") filed by Roy E. Henderson ("Henderson"), the permittee of KLTR in Caldwell, Texas, on September 29, 1997. Accordingly, the Commission now seeks comment on the decisional significance of the Second Supplement, and asks the parties to provide relevant or updated information concerning their allocation proposals. As shown below, the Commission should reject the faulty and now moot arguments presented in Henderson's Second Supplement, and should once again reaffirm its decision denying Henderson's allotment proposal in favor of the proposal presented by KTSR.

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^{1/} Request for Supplemental Comments in Response to Court Remand (April 9, 1999).

Background

The instant proceeding concerns two long-standing, competing FM channel allotment proposals by Henderson and KTSR. Specifically, KTSR proposed to substitute Channel 236C2 for Channel 297C3 in College Station, and modify the license of KTSR to specify operation on Channel 236C2. In order to accommodate this substitution in College Station, KTSR also proposed to substitute Channel 297A for Channel 236A in Caldwell and modify the KLTR construction permit to specify operation on Channel 297A. In contrast, Henderson proposed to substitute Channel 236C2 for Channel 236A in Caldwell, Texas and modify the construction permit of KLTR to specify operations on Channel 236C2.

On July 5, 1995, the Chief of the Allocations Branch of the Mass Media Bureau adopted an order rejecting Henderson's allotment proposal in favor of the allotment proposal presented by KTSR, largely due to Henderson's failure in his proposal to provide full city-grade coverage to Caldwell.^{2/} See 47 C.F.R. § 73.315(a). In response to Henderson's Petition for Reconsideration of this order, the Commission in May 1996 reaffirmed the Allocation Branch's decision.^{3/} Henderson then filed an Application for Review of the Commission's Recon Order, and later filed a Supplement and Second Supplement to that filing. While Henderson's Application for Review was pending, the Commission granted KTSR a construction permit for operation on channel 236C2 in College Station.^{4/} On July 22, 1998, the Commission denied Henderson's Application for Review, primarily on the basis, once again, that Henderson had failed to comply with the city-

^{2/} Report and Order, 10 FCC Rcd 7285 (M.M Bur. 1995) ("Order").

^{3/} Memorandum Opinion and Order, 11 FCC Rcd 5326 (1996) ("Recon Order").

^{4/} See Letter from James D. Bradshaw, Supervisory Engineer, Mass Media Bureau, to Bryan Broadcasting Lic. Subsidiary, FCC File No. BMPH-970124IA (March 20, 1998).

grade coverage requirements contained in Section 73.315(a) of the Commission's rules.^{5/} 47
C.F.R. § 73.315(a).

Following the Review Order, Henderson filed an appeal of this decision in the U.S. Court of Appeals for the D.C. Circuit.^{6/} Subsequently, the Commission determined that it had inadvertently failed to consider Henderson's Second Supplement in coming to its decision in the Review Order. In that filing, Henderson argued that KTSR's construction permit for the upgraded facility on Channel 236C2 would provide less than complete city-grade coverage of College Station, and that the Commission's Recon Order should therefore be reversed. Subsequently, on March 8, 1999, the U.S. Court of Appeals remanded this proceeding to the Commission in order to afford the Commission an opportunity to evaluate Henderson's Second Supplement.^{7/} In its "Request for Supplemental Comments in Response to Court Remand," the Commission now seeks comment on the decisional significance of the Second Supplement, and asks the parties to provide relevant or updated information concerning their allocation proposals.

Discussion

I. Henderson's Second Supplement is Now Moot, as KTSR's Operations Will In Fact Provide Full City-Grade Coverage of College Station

As described above, Henderson's Second Supplement focused exclusively on the fact that KTSR's then-proposed operation at Channel 236C2 would provide less than complete city-grade coverage of College Station, encompassing only 91.6% of that community. As a result, said Henderson, the Commission's grant of KTSR's allotment request should be reversed.

^{5/} Memorandum Opinion and Order, 13 FCC Rcd 13772 (1998). ("Review Order")

^{6/} Henderson v. FCC, D.C. Cir. 98-1372.

^{7/} Order, Henderson v. FCC, D.C. Cir. 98-1372 (March 8, 1999).

Unfortunately for Henderson, this argument is dated, and now moot. On April 19, 1999, KTSR filed with the Commission an application for minor modification of its construction permit for Channel 236C, seeking authority to operate at a new transmitter site located 8.5 kilometers east of its present authorized site.^{8/} As demonstrated in this application, KTSR's operations from this site will provide full city-grade coverage of College Station in compliance with Section 73.315(a). The ability of KTSR to specify a fully-spaced site demonstrates the wisdom of the Commission's insistence that applicants in allotment proceedings be able to demonstrate that full city-grade coverage can be provided from at least some transmitter site. Because of that requirement, KTSR can amend its application as it has done here to specify a site providing full city-grade coverage. For Henderson, however, no matter how hard he tries, even using the most optimistic predictive methodology available, he will never be able to fully cover Caldwell with a city-grade signal on Channel 236. Accordingly, the Second Supplement now has zero decisional significance, and the Commission should move quickly to reaffirm its denial of Henderson's allotment proposal.

II. Henderson's Failure to Comply with Section 73.315(a) Remains a Fatal Flaw in His Allotment Proposal

In these Supplemental Comments, KTSR takes the opportunity to remind the Commission that Henderson has never found a way to overcome the fatal flaw in his allotment proposal, his failure to provide full principal community coverage to Caldwell and comply with Section 73.315(a) of the Commission's rules. This has never been a case where we are comparing two proposals which, using the same methodology, are separated by only a few percentage points in the coverage of their respective cities of license with a city-grade signal. Instead, as set forth

^{8/} Application for Minor Modification of Construction Permit, KTSR(FM), College Station, TX, FCC File No. BMPH-970124IA (April 19, 1999).

below, Henderson's initial proposal, using standard methodology, covers **none** of Caldwell with a city-grade signal, while KTSR, from its currently proposed site, or the reference coordinates specified in its rulemaking proposal, covers 100% of College Station with a city-grade signal. Only by the most extreme machinations can Henderson ever advance the claim that his proposal covers 96% of Caldwell with a city-grade signal. Accordingly, the Commission should once more reject his tired arguments.

A. In determining signal coverage, Henderson is required to use standard prediction methods, which show that his proposed allotment covers little or any of Caldwell

As the Commission has explicitly found, using standard prediction methods, Henderson's proposal covers "little, or any of Caldwell," his city of license.^{9/} While Henderson has resorted to a variety of alternative coverage methodologies during this proceeding, Commission precedent requires it to ignore all of these showings. Simply put, Henderson cannot escape the defective nature of his initial proposal.

First, none of Henderson's alternative showings -- his actual terrain, "Tech Note 101, and terrain roughness correction studies -- were timely filed.^{10/} For the Commission to credit such alternative showings, they must be advanced in initial comments in a proceeding.^{11/} Since they were not so advanced, procedurally the Commission can reject them in favor of a timely filed proposal which complies with all Commission rules.

^{9/} Recon Order at 5327.

^{10/} See, e.g., Recon Order at 5327 (on the basis of 47 C.F.R. § 1.106, rejecting Henderson's use of Tech Note 101 study because it could have been submitted earlier through exercise of ordinary diligence).

^{11/} See Amor Family Broadcasting Group v. FCC, 68 RR2d 573 (D.C. Cir., 1990) (in the face of a conflicting proposal, the Commission was justified in dismissing a rulemaking proposal that was not complete as of the date for filing of initial comments).

Even if timeliness is not a bar, there are other procedural requirements necessary for the use of such alternative methodologies. Henderson has never satisfied these requirements, as set out in Woodstock and Broadway, Virginia, 3 FCC Rcd 6398 (1988). Under Woodstock, to escape the presumption of uniform terrain and gain the right to utilize an alternative coverage methodology, an allotment proponent has to demonstrate (i) that he has reasonable assurance of the transmitter site's availability and (ii) that he has obtained FAA approval of his tower. Despite his claims, Henderson has never established that he has received FAA approval of any specific antenna structure at his proposed tower site. The most Henderson has ever done on this point is to relate details of an informal conversation between his consultant and a Fort Worth, Texas FAA official, in which that official indicated that the FAA would have no problem with a hypothetical tower located just 200 feet away from an already-existing, taller tower.^{12/} As stated by the Commission in the Review Order, such a conversation does not constitute FAA approval under Woodstock. Review Order at para. 17. Moreover, the location of the existing tower and its relationship to the proposed Henderson tower has never been firmly established. KTSR showed that the tower coordinates presented by Henderson were erroneous, and that Henderson's proposed tower site was in fact approximately 1100 feet from the existing tower, thereby rendering any assurance from this FAA official immaterial.^{13/} In his Brief before the D.C. Circuit Court, Henderson now points to "the existence of a broadcast tower already located **1.2 miles**

^{12/} See Henderson Reply to Opposition to Application for Review, at 3, Declaration of F.W. Hannel (July 10, 1996).

^{13/} See KTSR Opposition to Application for Review, at 4, Declaration of Roy P. Stype, III (June 26, 1997).

west of Henderson's reference site" (emphasis added).^{14/} Henderson's revision of this critical figure at this late stage of this proceeding demonstrates not only the unreliability of his factual showings, but also that any oral assurance of FAA approval of a site 200 feet from an existing tower is entirely irrelevant to any consideration of Henderson's proposed site, as he has never established where that site is! This lack of specificity renders Henderson's proposal incapable of evaluation by the Commission.

With Henderson still unable to satisfy the Woodstock requirements, the Commission cannot consider his actual terrain, Tech Note 101, and terrain roughness correction studies. The Commission must then rely on the normal prediction methodology, and thus the Commission can only conclude that Henderson's allotment proposal does not provide any coverage of his community of license. Such a deficient proposal must be rejected.

B. Henderson's alternative showings do not demonstrate full city-grade coverage, and the Commission should maintain its policy against waivers of this coverage requirement in the allotment context

Even if satisfaction of the Woodstock criteria were assumed, it has been established that neither Henderson's actual terrain study nor his terrain roughness correction analysis achieves full city-grade coverage, and, therefore, neither weighs in favor of his allotment proposal. First, as previously discussed in this proceeding, using the actual terrain methodology, Henderson's Caldwell facility's 70 dBu contour would extend 34.9 kilometers and encompass only 96% of that community. Meanwhile, in its Review Order, the Commission itself found that the terrain roughness correction technique set forth in Section 73.313(j) of its rules would extend the city-grade signal less than one tenth of a kilometer,, and that Henderson's signal would not reach any

^{14/} Brief of Appellant-Petitioner Roy E. Henderson, Henderson v. FCC, D.C. Cir. 98-1372 (March 8, 1999), at 44.

portion of Caldwell. Review Order at para. 16.

In response to this coverage shortfall, Henderson has long argued that the Commission should waive its principal community coverage requirement in this channel allotment proceeding. Henderson has pointed out that where an applicant for construction permit demonstrates greater than 80% coverage of its principal community, the Commission considers that applicant to have achieved “substantial compliance” with Section 73.315(a) of the Commission’s rules and waives this full city-grade coverage requirement. See, e.g., Barry Skidelsky, 7 FCC Rcd 5577 (1992); Greenwood, South Carolina, 3 FCC Rcd 4108 (1988); John R. Hughes, 50 Fed. Reg. 5679 (February 11, 1985).

As Henderson is well aware, however, allotment and application proceedings serve distinct purposes, and it is only at the **allotment** stage that a filer must demonstrate full city-grade coverage.^{15/} The Commission’s allotment tables establish the operational framework for a broadcast service. These tables are designed to ensure that full signal coverage is possible in every community of license, and that there is sufficient geographic and channel spacing between stations. Accordingly, with respect to coverage, an allotment proponent must demonstrate that there is some theoretical location within the proposed community of license from which a broadcaster can provide 100% city-grade coverage. If an allotment is made that cannot fully provide city-grade coverage, achieving such coverage will never be possible under that allotment. In the Commission’s view, the grant of an allotment that does not meet this requirement would be

^{15/} In the Second Supplement, Henderson once more argues that the Commission waived its city-grade coverage rule at the allotment stage in Bay Shore, NY, 57 RR 2d 1275 (1985); Recon. denied 59 RR 2d 1652 (1986); aff’d 62 RR 2d 497 (1987). As KTSR has previously made clear, the Commission’s decision in Bay Shore occurred under extraordinary circumstances and is inapposite to the current controversy. See KTSR Opposition to Application for Review at 8-9.

“wasteful” and “counterproductive,” leaving an applicant unable to provide full coverage to its community of license, no matter its proposed operational parameters. Greenwood, South Carolina, 3 FCC Rcd at 4110.

In contrast, a flexible policy towards city-grade coverage is appropriate in the application context. At the application stage, the Commission can better evaluate concrete site proposals and consider the costs and benefits associated with potential transmitter locations.^{16/} Moreover, in contrast to channel allotment proponents, applicants have the ability to modify their operations to achieve full city-grade coverage, as KTSR has recently done.

If a proposal such as that of Henderson were adopted, allotments which could never cover their principal city with a city-grade signal would be allowed. This would fundamentally alter many of the Commission’s existing processing policies, both in allotment proceedings and in connection with “one-step upgrades” permitted pursuant to Sections 1.420 and 73.203 of the Commission’s rules. If Henderson’s position were adopted, hundreds of new substandard allotments would be made, each incapable of ever placing a city-grade signal over the communities which they are supposed to be serving.^{17/} The Commission should not countenance

^{16/} In refusing to extend the 80% “substantial compliance” policy to the allotment context, the Commission has stated repeatedly that at the allotment stage it does not have the information necessary to make informed judgments regarding requests for waiver of its city-grade coverage rule. During an allotment proceeding, the Commission says, it generally cannot evaluate the actual transmitter sites that will be specified in applications not yet filed. See, e.g., Cloverdale, Montgomery and Warrior, Alabama, MM Docket No. 94-78, at para. 5 (February 21, 1997). While Henderson’s allotment proposal does specify a transmitter site, the Commission cannot presume the viability of this site given Henderson’s failure to demonstrate FAA approval as required by Woodstock, and because of Henderson’s failure to advance the specifics of his proposal in a timely fashion. Thus, the Commission’s rationale for not extending the application standard to the allotment context is directly applicable to the current proceeding.

^{17/} Grant of Henderson’s proposal would also promote gamesmanship by rulemaking
(continued...)

such a rewrite of its long-standing allocations policy.

Accordingly, the Commission should again reject Henderson's misguided effort to overturn the Commission's logically sound and well-established policy against waivers of Section 73.315(a) in the channel allotment context.

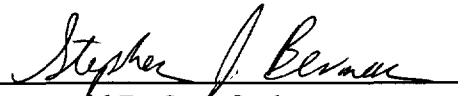
Conclusion

For the foregoing reasons, the Commission should reject the arguments contained in Henderson's Second Supplement and expeditiously deny, once again, Henderson's Application for Review.

Respectfully submitted,

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^{17/} (...continued)

proponents as they advance different methodologies to demonstrate a sufficient level of city-grade coverage. In this case, after experimenting with multiple methodologies, only by using the most optimistic technique does Henderson even come close to providing city-grade coverage to all of Caldwell.